

CITY OF NASHUA DELIBERATIONS

By Order No. 24,379 (October 1, 2004), we requested that the parties submit briefs addressing the question of whether RSA Chapter 38 grants the City of Nashua the authority to take the property of Pennichuck Water Works, Pennichuck East Utility and Pittsfield Aqueduct Company, three affiliated entities that are subsidiaries of Pennichuck Corporation. This question presents a legal issue that must be resolved as a threshold matter in order to promote the orderly conduct of the proceeding.

Nashua contends it may take the property of all three affiliates while Pennichuck contends that Nashua may not take the property of PEU or PAC. In performing an analysis of the issue, it is necessary to take official notice that each of the three affiliates is a separate corporate entity, that each was granted its own franchise, that each has its own tariff, that each is separately assessed by the Commission pursuant to RSA 363-A, and that only Pennichuck Water Works is engaged in the sale of water in the City of Nashua.

Inasmuch as a municipality may exercise only those powers expressly delegated to it by the State, the first step in the analysis of the issues is to examine the enabling language contained in RSA 38:2. That provision states: “Any municipality may...take...plant for the manufacture and distribution of...water for municipal use, for the use of its inhabitants and others, and for such other purposes as may be permitted, authorized, or directed by the commission.”

After setting forth the grant of authority, RSA Chapter 38 then lays out a detailed process that a municipality must follow in order to exercise that authority. RSA 38:3 provides that a 2/3 majority vote of the governing body to take property will create a rebuttable presumption that the taking is in the public interest. RSA 38:6 then requires that the governing body “notify in writing any utility engaged, at the time of the vote, in...distributing...water for sale in the municipality, of the vote.” That section also provides that the municipality “may purchase all or such portion of the utility’s plant and property located within such municipality that the governing body determines to be necessary for the municipal utility service, and shall purchase that portion, if any, lying without the municipality which the public interest may require...as determined by the commission.”

On first reading, RSA 38:2 arguably grants a municipality broad authority to take property beyond its borders, in that it allows the taking of property for use not only by the municipality and its inhabitants but by “others”, which is undefined, and for purposes, also undefined, as authorized by the Commission. The City of Nashua argues, accordingly, that it may take the property of the three utilities, PWW, PEU and PAC. On the other hand, Pennichuck argues that RSA 38:6 restricts the City of Nashua’s authority to taking the property only of a utility engaged in the sale of water in Nashua, namely PWW.

The parties have posed plausible conflicting interpretations of RSA Chapter 38 based on references to separate, specific statutory language. In order to resolve the conflict, we look to case law and legal treatises for guidance on how to interpret the breadth of the power of eminent domain and to recognized rules of statutory construction. First, as an overarching principle, we recognize that a legislative grant of power to condemn for a public use may be exercised only within a clear definition of the grant and that such delegations of power should be narrowly construed. Furthermore, we must interpret the statute “not in isolation, but in the context of the

overall statutory scheme” and we must “keep in mind the intent of the legislation, which is determined by examining the construction of the statute as a whole.” Finally, in light of the internal conflict posed by the seemingly broad grant of authority that Nashua argues is contained in RSA 38:2, and the limitation that Pennichuck argues is contained in RSA 38:6, we turn to legislative history to determine the Legislature’s intent.

Within this analytical framework, the crux of the issue is the proper interpretation of RSA 38:6. Nashua essentially ignores the portion of the statute that requires notice to a utility engaged in the sale of water in Nashua and focuses on a later reference to the public interest. Pennichuck centers its argument on the required notice to a utility engaged in the sale of water in Nashua, that is, PWW alone. The relevant question then becomes: Is RSA 38:6 a mere notice provision, or does RSA 38:6 constitute a substantive limitation on the grant of authority in RSA 38:2?

To answer this question, we begin first by considering RSA 38:6 through the lens of a strict construction. In that context, we must give meaning to the language requiring that the governing body notify the “utility engaged...in...distributing...water for sale in the municipality.”

Consequently, since PWW is the only utility selling water in Nashua, it follows that PWW is the only entity that could be the recipient of a valid notice and therefore only the property of PWW could be taken.

As to Nashua's argument regarding the language in RSA 38:6 that the municipality "shall purchase that portion, if any, [of the plant and property] lying without the municipality which the public interest may require," that particular public interest determination must be read in the context of a narrowly construed grant of authority and not in a manner that would invalidate the notice requirement. To do otherwise and adopt Nashua's approach could conceivably make the taking power pursuant to RSA 38:2 virtually unlimited, which would be incompatible with the principle that a power of eminent domain may only be exercised within a clear definition of the grant of authority. In this case, Nashua seeks to make the reference in RSA 38:2 to "others" limited only by the Commission's determination of the scope of the public interest, which would be an unsupportable expansion of the enabling language.

In seeking to resolve the conflicting interpretations of RSA 38 posed by the parties, we look also to legislative intent as expressed through the

legislative history of RSA Chapter 38. Such intent is reflected in comments by the sponsors of HB 528 before the Senate Committee on Executive Departments & Administration on April 21, 1997, concerning the re-enactment of RSA Chapter 38. Representative Below stated at that time “that a municipality may have to acquire some property outside of its boundaries. If there [are] some customers that would otherwise be stranded with a small distribution line that crosses a municipal boundary the commission would have the power to order the utility that is selling its property or having its property acquired and also order the municipality to acquire that portion of a system that may be outside of their boundaries.”

Our reading of the legislative history of the re-enactment of RSA Chapter 38 persuades us that the Legislature intended that the extent of the taking power that could be exercised beyond municipal boundaries would be limited. The legislative history also makes repeated references to the taking of the property of a utility, in the singular, and does not appear to contemplate the taking of the property of additional utilities that serve solely outside the municipal boundaries, as Nashua seeks to do.

The legislative history and the legislative intent are in conflict with Nashua's expansive interpretation of RSA Chapter 38. Moreover, Nashua's interpretation would lead to the incongruous result that a single municipality could effectively "municipalize" property in the twenty-one towns and cities that the three Pennichuck utilities serve. If Nashua's expansive interpretation of RSA Chapter 38 were to be given credence, it would mean that Nashua had the power to take property on a scale equivalent to a regional water district, something that the Legislature, less than two years ago, denied water districts formed pursuant to RSA 38:2-a.

Based on the overall statutory scheme, the construction of the statute as a whole, and the legislative history and intent, the analysis of RSA Chapter 38 leads to the conclusion that the eminent domain authority delegated by the Legislature in RSA 38:2 should be narrowly construed and that the notice requirement in RSA 38:6 should be given full effect. Accordingly, the property of PEU and PAC may not, as a matter of law, be taken by the City of Nashua.

As to the property of Pennichuck Water Works, inasmuch as Pennichuck Water Works is engaged in the sale of water in Nashua, Nashua

may, as a matter of law, pursue the taking of such property. The extent of that taking will be determined by the Commission as a question of fact after a hearing.